

United States District Court  
Eastern District of California

Gregory Tabarez,

Plaintiff,

No. Civ. S 04-0360 LKK PAN P

vs.

Findings and Recommendations

Diana Butler, et al.,

Defendants.

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Plaintiff is a prisoner prosecuting this civil rights action without counsel. See 42 U.S.C. § 1983. He alleges that April 8, 2002, defendants intentionally released incompatible groups of Hispanics to a handball court to instigate a riot and when plaintiff was attacked they failed to protect him. Defendants move to dismiss upon the ground plaintiff failed to exhaust the available administrative remedies.

On a motion to dismiss for failure to exhaust available administrative remedies, the court may look beyond the pleadings

1 and decide disputed facts. Wyatt v. Terhune, 315 F.3d 1108 (9th  
2 Cir. 2002). 42 U.S.C. § 1997e(a) provides that a prisoner may  
3 bring no § 1983 action until he has exhausted such administrative  
4 remedies as are available. The requirement is mandatory. Booth  
5 v. Churner, 532 U.S. 731, 741 (2001). Administrative remedies  
6 are available so long as some form of redress may be obtained  
7 through an established procedure. Booth, 532 U.S. at 738-39.  
8 The administrative remedy must be exhausted before suit is  
9 brought and a prisoner is not entitled to a stay of judicial  
10 proceedings in order to exhaust. McKinney v. Carey, 311 F.3d 1198  
11 (9th Cir. 2002). Where a litigant requests leave to proceed in  
12 forma pauperis, suit commences when the request is granted. See  
13 28 U.S.C. § 1915(a)(1) (court may "authorize commencement" of  
14 suit without prepayment of filing fee for person demonstrating  
15 inability to pay).

16 California prisoners may appeal "any departmental decision,  
17 action, condition, or policy which they can demonstrate as having  
18 an adverse effect upon their welfare." 15 Cal. Admin. Code  
19 § 3084.1(a). A prisoner must submit his appeal within 15 work  
20 days of the event or decision appealed or of receiving an  
21 unsatisfactory decision on a lower level. 15 Cal. Admin. Code §  
22 3084.6(c). The regulations require the use of specific forms but  
23 contains no guidelines for grievance content. 15 Cal. Admin.  
24 Code §§ 3084.2, 3085 (designating use of CDC Form 602  
25 Inmate/Parolee Appeal Form for all grievances except those  
26 related to disabilities under the Americans with Disabilities

1 Act, which are filed on CDC Form 1824, Reasonable Modification or  
2 Accommodation Request). Prisoners ordinarily must present their  
3 allegations on one informal and three formal levels of review.  
4 15 Cal. Admin. Code § 3084.5. The informal level is waived for  
5 and the appeals coordinator must bypass the first formal level  
6 for certain classes of appeals. 15 Cal. Admin. Code §  
7 3084.5(a) (3), (b). The institution head or his designee reviews  
8 appeals on the second level. 15 Cal. Admin. Code § 3084.5(e) (1).  
9 Decisions on the third level, the Director's Level of Review,  
10 cannot be appealed and conclude the administrative process. 15  
11 Cal. Admin. Code § 3084.1(a).

12 July 18, 2002, plaintiff submitted a grievance about the  
13 events of April 8, 2002. He requested official reprimand and  
14 "restraint" of staff involved in those events. July 25, 2002,  
15 petitioner received notice the appeals coordinator rejected the  
16 grievance upon the ground petitioner exceeded the time-limit for  
17 grieving the events of April 8. Under the heading, "Please  
18 Follow Instructions and Return with your CDC-602," the appeals  
19 coordinator wrote, "You have 15 working days to file an appeal.  
20 I will forward a copy of your complaint to Warden Butler for any  
21 action she deems necessary." Also July 25, 2002, plaintiff had  
22 to relinquish all personal property in preparation for his  
23 transfer from Folsom State Prison to San Quentin State Prison.

24 Petitioner appealed August 27, 2002, upon the ground his  
25 initial grievance was not late because he was in administrative  
26 segregation until August 9, 2002, and disciplinary proceedings

1 against him based on the riot were ongoing. He requested leave  
2 to exhaust administrative remedies so he could file a civil  
3 rights action in federal court. August 28, 2002, the appeals  
4 coordinator at San Quentin State Prison directed the appeal to  
5 staff at Folsom State Prison, who informed San Quentin staff the  
6 appeal had been rejected as untimely. September 19, 2002,  
7 plaintiff received notice his appeal was rejected because his  
8 initial grievance was untimely.

9 September 22, 2002, plaintiff appealed to the director's  
10 level of review, again arguing his initial grievance was not late  
11 because he was in administrative segregation until August 9,  
12 2002, and disciplinary proceedings against him based on the riot  
13 were ongoing. October 7, 2002, plaintiff's appeal papers were  
14 returned because his original appeal was untimely.

15 Defendants contend plaintiff failed to exhaust because his  
16 initial grievance was untimely. The appeals coordinator  
17 forwarded a copy of the grievance to the warden, effectively  
18 bypassing the first formal level of review. See 15 Cal. Admin.  
19 Code § 3084.5(b) (3) (authorizing bypass of the first formal level  
20 for issues "which cannot be resolved at the division head's  
21 level"); 15 Cal. Admin. Code § 3084.5(e) (1). Since Warden Butler  
22 did not respond to plaintiff in writing, plaintiff could not  
23 appeal her decision and no further remedy was available.  
24 Accordingly, plaintiff exhausted available administrative  
25 remedies. See Lewis v. Washington, 300 F.3d 829, 833 (7th Cir.  
26 2002) (administrative remedy unavailable when prison officials'

1 neglect or omission prevents an inmate from utilizing them);  
2 Brown v. Croak, 312 F.3d 109 (3rd Cir. 2002) (same); Foulk v.  
3 Charrier, 262 F.3d 687, 698 (8th Cir. 2001) (same).

4 The Ninth Circuit Court of Appeals recently addressed the  
5 question of whether a prisoner who files an untimely  
6 administrative appeal defaults a state procedure such that he  
7 cannot bring a civil rights action in federal court. Ngo v.  
8 Woodford, 2005 WL 674707 (C.A. 9 (Cal.)). In that case, an  
9 appeals coordinator rejected Ngo's initial grievance as late and  
10 advised Ngo he could appeal the finding of untimeliness. Ngo's  
11 timely appeal was rejected and he filed a civil rights action in  
12 federal court. The District Court dismissed the action as  
13 unexhausted under 42 U.S.C. § 1997e(a), reasoning that since  
14 Ngo's initial grievance was time-barred he did not exhaust  
15 available administrative remedies.

16 The appellate court held that when a prisoner's appeal is  
17 rejected as untimely and defendants cannot identify any further  
18 remedy, the prisoner has exhausted under 42 U.S.C. § 1997e(a).  
19 Ngo. Explaining that the purpose of exhaustion under 42 U.S.C. §  
20 1997e(a) is different from that in habeas corpus, the court held  
21 that when a prisoner is deemed to have defaulted time  
22 requirements for pursuing an administrative remedy, § 1997e(a)  
23 does not bar suit in federal court. Id.

24 The appeals coordinator in this case advised plaintiff he  
25 could appeal her decision within 15 work days. Plaintiff's  
26 transfer prevented him from complying with the time-limit but

1 once settled at San Quentin, he appealed the determination his  
2 initial grievance was untimely through the director's level of  
3 review. Those appeals were rejected. Defendants do not identify  
4 any other remedy available to plaintiff. Accordingly, plaintiff  
5 exhausted available administrative remedies and his default of  
6 the time limit does not bar this court from entertaining this  
7 action. Ngo, supra.

8 For these reasons, defendants' October 25, 2004, motion to  
9 dismiss should be denied and defendants should be directed to  
10 file and serve an answer within 30 days.

11 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these  
12 findings and recommendations are submitted to the United States  
13 District Judge assigned to this case. Within 20 days after being  
14 served with these findings and recommendations, plaintiff may  
15 file written objections. The document should be captioned  
16 "Objections to Magistrate Judge's Findings and Recommendations."  
17 The district judge may accept, reject, or modify these findings  
18 and recommendations in whole or in part.

19 Dated: June 2, 2005.

20 \_\_\_\_\_/s/ Peter A. Nowinski  
21 PETER A. NOWINSKI  
22 Magistrate Judge  
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